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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re R.J., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.J., Defendant and Appellant.	A143255 (City & County of San Francisco Super. Ct. No. JW 14-6215)

R.J. appeals from a dispositional order declaring him a ward and committing him to the custody of the probation department for an out-of-home placement after he was found to have violated Penal Code sections 30605 (possession of an assault weapon) and 29610 (minor in possession of a concealable firearm). He contends that the jurisdictional findings were not supported by substantial evidence, that the disposition was an abuse of discretion, and that the dispositional order erroneously failed to specify the maximum term of confinement. We remand with directions to the juvenile court to fix a maximum term of confinement, but otherwise affirm.

I. BACKGROUND

Damon Jackson, a Sergeant in the San Francisco Police Department Gang Task Force, testified at the jurisdictional hearing that a MAC 11 firearm was seized from another minor, L.M., in July 2014. R.J. was arrested and interviewed after police

discovered a photo of him on Instagram posing with the firearm. In the interview, R.J. said that he knew the MAC 11 was a real gun, and he was just "flexing" with it in the picture. He first said it was a friend's gun, but then said he did not know who owned the gun. Jackson testified that "[f]lexing with a gun is to intimidate," a " 'don't mess with me' type of thing." R.J. had other photos of him holding the MAC 11 and another gun on his cell phone.

Jackson testified that the MAC 11 was more expensive than a normal 9-millimeter handgun, and thus would typically be shared by a group of people. The MAC 11 was an assault weapon because it had a threaded barrel that allowed a silencer to be attached, and because it had an extended, detachable magazine. The gun was concealable because a loop of shoestring was attached to it. "The individual puts [the shoestring] around their neck, zips up a jacket, and they walk around with [the gun] across their chest."

R.J. testified that his "flexing" with the gun "meant just to show off with it." He did not intend to frighten anyone. He said that if he were "to take a picture with a lot of money, that would be a form of flexing."

Defense counsel argued there was no evidence that R.J. knew or reasonably should have known that the gun was an assault weapon. The court determined that a reasonable inference could be drawn to the contrary, and found that R.J. possessed an assault weapon and a concealable weapon as alleged in the wardship petition.

II. DISCUSSION

A. Substantial Evidence

(1) *Penal Code Section 30605*

R.J. contends that the court lacked substantial evidence from which to find that he violated Penal Code section 30605, part of the Roberti-Roos Assault Weapons Control Act of 1989 (AWCA) (Pen. Code, § 30500, et seq.), when he possessed the MAC 11 firearm. (*People v. Zondorak* (2013) 220 Cal.App.4th 829, 831.) To convict under the AWCA, the People must prove that the defendant knew or should have known that the firearm he possessed was an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th866, 887 (*Jorge M.*) [construing former Pen. Code, § 12280, which has been renumbered as Pen.

Code, § 30605 without substantive change (*People v. Zondorak*, *supra*, 220 Cal.App.4th 829, fn. 1)].)

Jorge M. "construe[d] [Penal Code] section 12280, [subdivision] (b) as requiring knowledge of, or negligence in regard to, the facts making possession criminal. In a prosecution under [Penal Code] section 12280, [subdivision] (b), that is to say, the People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics bringing it within the AWCA. The question of the defendant's knowledge or negligence is, of course, for the trier of fact to determine, and depends heavily on the individual facts establishing possession in each case. Nevertheless, we may say that in this context the Legislature presumably did not intend the possessor of an assault weapon to be exempt from the AWCA's strictures merely because the possessor did not trouble to acquaint himself or herself with the gun's salient characteristics. Generally speaking, a person who has had substantial and unhindered possession of a semiautomatic firearm reasonably would be expected to know whether or not it is of a make or model listed in [Penal Code] section 12276 or has the clearly discernable features described in [Penal Code] section 12276.1. At the same time, any duty of reasonable inquiry must be measured by the circumstances of possession; one who was in possession for only a short time, or whose possession was merely constructive, and only secondary to that of other joint possessors, may have a viable argument for reasonable doubt as to whether he or she either knew or reasonably should have known the firearm's characteristics." (*Jorge M.*, *supra*, 23 Cal.4th at pp. 887–888.)

The court further reasoned: "In most instances the fact a firearm is of a make and model listed in [Penal Code] section 12276, or added pursuant to [Penal Code] section 12276.5, can be expected to be sufficiently plain on examination of the weapon so that evidence of the markings, together with evidence the accused possessor had sufficient opportunity to examine the firearm, will satisfy a knew-or-should-have-known requirement. [Citations.] Furthermore, because of the general principle that all persons are obligated to learn of and comply with the law, in many circumstances a trier of fact properly could find that a person who knowingly possesses a semiautomatic firearm

reasonably should have investigated and determined the gun's characteristics. The exceptional cases in which the salient characteristics of the firearm are extraordinarily obscure, or the defendant's possession of the gun was so fleeting or attenuated as not to afford an opportunity for examination, would appear to be instances of largely innocent possession that, as discussed above, the Legislature presumably did not intend to be subject to felony punishment." (*Jorge M.*, *supra*, 23 Cal.4th at p. 885.)

R.J. contends that his case is one of the "exceptional" ones to which *Jorge M.* referred because "the salient characteristics of the firearm [were] extraordinarily obscure," and his possession of the gun was "fleeting." (*Jorge M.*, *supra*, 23 Cal.4th at p. 885.) Sergeant Jackson effectively conceded that not all MAC 11 firearms are assault weapons, and R.J. observes that no markings on the gun confirmed that it was an assault weapon (*ibid*.). However, the barrel and magazine that made the firearm an assault weapon are integral parts of a gun, and their characteristics (threaded barrel, detachable, extended magazine) were not so "extraordinarily obscure" as to compel a finding as a matter of law that R.J. should not reasonably have known that the gun was an assault weapon. The issue was "for the trier of fact to determine." (*Id*. at p. 887.) R.J. is also mistaken in claiming the evidence established that he never touched the gun before he was photographed with it, and the People presented no evidence that he possessed the gun any longer than was necessary to pose with it. Jackson testified that pictures of R.J. with the gun in addition to the photo that led to R.J's arrest were found on his cell phone, and that possession of guns like the MAC 11 is generally shared among several individuals. Based on this testimony, the court could reasonably find that R.J. had more than a fleeting acquaintance with the firearm. We therefore reject the substantial evidence argument with respect to the Penal Code section 30605 violation.

(2) *Penal Code Section 29610*

R.J. contends that a scienter requirement like the one *Jorge M.* applied to Penal Code section 30605 should also be imputed to Penal Code section 29610, which prohibits a minor from possessing a concealable weapon. We are inclined to agree with the People that no such requirement should be implied because "[a]n offender could not be

reasonably without knowledge of whether a firearm is concealable. The weapon either can be concealed or it cannot." We need not reach this issue because, even if scienter is required, substantial evidence supported a finding that R.J. knew or should have known that the gun was concealable. The loop of shoestring attached to the gun was one of the weapon's prominent features in the photo for which R.J. was arrested, and the court was not bound as a matter of law to find that R.J. would not have known what the shoelace was for. Thus, substantial evidence supported the court's finding on the Penal Code section 29610 count.

B. Delinquency Versus Dependency

R.J. contends that the court erred when it declared him a ward and did not continue him as a dependent child.

(1) *Record*

The probation department filed a Welfare and Institutions Code section 241.1 report discussing R.J.'s background, his dependency case, and a CASE (Committee for Assessment & Status Evaluation) meeting attended by representatives of the probation department, the child welfare agency, and R.J.'s dependency counsel. The report indicated that R.J.'s relationship with his father ended at age seven, and that he lived with his mother until he was 12, when he "started to get out of control." At age 14, he began living with a relative of his grandmother who physically abused him. Mother left R.J. with a second cousin, who sought the child welfare agency's assistance in caring for him. R.J. was declared a dependent, and placed with his grandparents after the cousin said she "no longer wished to care for [R.J.] due to his behavioral issues. [The grandmother] reported several incidents . . . . The first being one where [R.J.] had brought girls and ammunition into [the cousin's] home. The other being an incident in which several people, whom [R.J.] had issues with, came to [the cousin's] home looking for him."

The report provided the following background on the delinquency case: "[O]n 07/18/2014 . . . a youth, [L.M.], was arrested for possession of a Mac 11 fully automatic firearm, and negligent discharge of a firearm. . . . Following this incident, a search warrant was authored for several associates of [L.M.] and the Mac Block criminal street

gang. The search produced a photograph of [R.J.] holding a Mac 11 firearm by the extended magazine with his right hand and holding up a symbol that depicts a seven and a two with his left hand. '72' is a symbol which the Officers recognized as being used by the Mac Block criminal street gang. Officers determined that the photograph was taken on 07/15/2014, and resembled the Mac 11 that [L.M.] was found to be in possession of. [¶] Officers believed that [L.M.] and [R.J.] are associates . . . ." CASE recommended that R.J. be made a ward.

The probation department's dispositional report noted that R.J.'s arrest on the weapons charges was his first arrest. However, a second delinquency petition had been filed charging him with assault of another student during a class at juvenile hall. "Counselors observed [R.J.] get up from his seat and punch [the victim] for no reason as [the victim] was seated at his desk. Counselors observed [R.J.] deliver numerous closed fist punches to [the victim's] head. Counselors assisted [R.J.] to the ground. He continued to refuse to follow the directives of the Counselors. Counselors applied mechanical restraints and escorted [R.J.] to his room." The report also described a previous incident when R.J. was transferred out of a high school after attacking another student. The victim in that incident declined to press charges.

The report stated that the probation department presented R.J.'s case before a multi-disciplinary team, and recommended that he be committed to the Log Cabin Ranch School. "The Multi-Disciplinary Team reviewed [R.J.'s] prior contacts, Court findings, school records, Human Services Agency records, his family's circumstances, the YASI risk assessment, prior interventions, mental health history, and his behavior at Juvenile Hall. [¶] The Multi-Disciplinary Team recommended that [R.J.] be committed to the Chief Probation Officer for out of home placement." The report continued: "[D]ue to th[e] nature of [R.J.'s] offense, in which he posted a picture of himself holding an assault weapon and throwing up a gang sign, the Juvenile Probation Department is extremely concerned for [R.J.'s] safety and the safety of the community. Whether taking the picture was simply a foolish decision or planned threat towards rival gang members, it will be in [R.J.'s] interest to be away from the Bay Area."

At the disposition hearing on the weapons offenses, R.J. admitted commission of misdemeanor assault in the incident at juvenile hall. R.J.'s counsel agreed with the recommendation for out-of-home placement. Counsel stated that she had spoken with R.J. "about his rights to contest [the proposed disposition], and what the potential consequences are and opportunity for him. As well, I've had extensive discussions with his grandmother and mother . . . [¶] And today, [R.J.] will be submitting to the recommendation for the out-of-home-placement. It, I think, might be a better opportunity for him, given some of the things he's facing."

The court committed R.J. to the chief probation officer for out-of-home placement.

(2) *Analysis*

Welfare and Institutions Code section 241.1, subdivision (a)[1] provides: "Whenever a minor appears to come within the description of both Section 300 and . . . Section . . . 602, the county probation department and the child welfare service department shall . . . initially determine which status will serve the best interests of the minor and the protection of society. The recommendations of both departments shall be presented to the juvenile court . . . and the court shall determine which status is appropriate for the minor." The report must consider, among other things, the "nature of the referral," the "prior record of the minor for out-of-control or delinquent behavior," the "history of any physical, sexual, or emotional abuse of the child," the "records of other agencies that have been involved with the minor and his or her family," and any "services or community agencies that are available to assist the child and his or her family." (§ 241.1, subd. (b)(2); Cal. Rules of Court, rule 5.512(d)(3) & (10).) The court "determine[s] which type of jurisdiction over the child best meets the child's unique circumstances." (Cal. Rules of Court, rule 5.512(e).) The determination is reviewed for abuse of discretion. (*In re M.V.* (2014) 225 Cal.App.4th 1495, 1506.)

R.J. argues that the probation department and child welfare agency's assessment report "failed to adequately take into account [his] lack of prior arrests," and failed to

[1] Subsequent statutory references are to the Welfare and Institutions Code.

"adequately consider" the "relatively harmless nature" of his criminal offenses—"posing in a photograph, with someone else's MAC 11 firearm." However, the joint assessment report stated that R.J. had no previous contact with the probation department, and the department's disposition report advised that he had no prior arrests. The assessment report indicated that the arrest was precipitated by the photograph in which R.J. was holding an assault weapon and making a gang sign with his free hand. There was no deficiency in the information provided to the court.

R.J. observes that the department and the agency were concerned with his safety as well as that of the community, a concern he describes as "align[ing] perfectly with the goals of . . . section 300 dependency (to protect the child), not with . . . section 602 ward status (to enforce accountability, rehabilitate, and protect the public)." But the department, agency, and court could reasonably conclude that he needed the level of supervision a wardship would provide. The court did not abuse its discretion in deciding that he should be a ward rather than a dependent.

R.J. contends that his counsel was incompetent because she failed to object to the alleged inadequacies in the joint assessment report, or to the wardship decision. However, the reports to the court were more than adequate, the wardship decision was more than reasonable, and there were no meritorious grounds to object to them. There are no grounds to claim ineffective assistance of counsel.

C. Maximum Term of Confinement

A dispositional order declaring wardship and removing the minor from the custody of his or her parent or guardian must specify the maximum term of confinement. (§ 726, subd. (d).) Before proceeding with the disposition on September 18, 2014, the court took R.J.'s admission to misdemeanor assault at juvenile hall. Before taking that admission, the court confirmed R.J.'s understanding that he faced a maximum term of confinement of three years and four months. However, the dispositional order erroneously fails to specify the maximum term of confinement. R.J.'s appellate counsel advises that she has written the juvenile court and requested that the omission be rectified, but the record does not indicate whether this was accomplished.

III. DISPOSITION

The jurisdictional order filed on September 4, 2014, is affirmed. The dispositional order filed on September 19, 2014, is reversed insofar as it fails to specify the maximum term of confinement. In all other respects, the dispositional order is affirmed. The case is remanded for specification of the maximum term of confinement in the dispositional order if that has not already been done.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.